

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN MARIE CZAJKOWSKI KLOSS,

Plaintiff-Appellee-Cross-Appellant,

v

NORBERT PAUL CZAJKOWSKI,

Defendant-Appellant-Cross-
Appellee.

UNPUBLISHED

December 29, 2005

No. 257737

St. Clair Circuit Court

LC No. 93-001962-DO

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

In this divorce action that was commenced in 1993 and which has wound its way through this Court on two prior occasions resulting in remand orders, defendant appeals as of right and plaintiff cross appeals the trial court's "amended judgment of divorce upon second remand." See *Czajkowski v Czajkowski*, unpublished opinion per curiam of the Court of Appeals, issued September 4, 1998 (Docket No. 195960) (*Czajkowski I*); *Czajkowski v Czajkowski*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2002 (Docket No. 222121) (*Czajkowski II*). We affirm in part and vacate in part.

This case and appeal involve a long-fought and continuing dispute regarding spousal support and attorney fees. Accounting fees are also at issue here. A divorce judgment was originally entered in 1996. Property division issues, as well as other peripheral issues, were resolved in the first appeal when this Court affirmed the trial court's rulings on said matters. *Czajkowski I, supra*. Plaintiff twice successfully challenged on appeal spousal support and attorney fee awards that she argued were legally insufficient. *Id.*; *Czajkowski II*. She was originally awarded \$62,400 per year in spousal support for a period of eight years, and she had been awarded \$10,000 in attorney fees during the pendency of the litigation, but no additional attorney fees were awarded pursuant to the judgment of divorce. Furthermore, the trial court's division of the marital estate effectively provided plaintiff with payment of half the \$50,000 in accounting fees that she incurred. See *Czajkowski I, supra*, slip op at 4. On remand, she was awarded \$84,000 per year in spousal support, again for an eight-year period. Plaintiff was also awarded \$35,000 in attorney fees.

On second remand, the subject of this appeal, an amended judgment was entered providing that defendant shall pay plaintiff \$125,000 per year in spousal support for the period of

June 6, 1996, through December 31, 2001, that defendant shall pay spousal support of \$145,000 per year thereafter until plaintiff's death, remarriage, or further order of the trial court, and that the arrearage created by the judgment is non-dischargeable in bankruptcy and shall survive plaintiff's and defendant's deaths. According to the amended judgment, the arrearage shall be paid in the amount of no less than \$40,000 annually. The amended judgment further provides that defendant shall pay plaintiff \$246,729 to go toward plaintiff's attorney fees, which sum is additional to the \$45,000 previously paid by defendant pursuant to earlier orders of the court. Defendant was also ordered to pay \$50,000 for plaintiff's accounting fees. According to the amended judgment, the \$296,729 total due by defendant for plaintiff's attorney and accounting fees shall be paid in 60 monthly installments, plus interest.

We first dispose of the issue regarding accounting fees. Defendant argues that the award of \$50,000 in accounting fees went beyond the scope of the remand, and thus the trial court lacked the authority to so order. We agree. As noted above, in *Czajkowski I*, *supra*, slip op at 4, this Court expressed that the trial court's division of the marital estate effectively provided plaintiff with payment of half the \$50,000 in accounting fees that she incurred. The property division award was upheld, and the remand provisions of the opinion stated nothing about consideration of a separate award regarding accounting fees. In *Czajkowski II*, this Court's opinion remanded solely with respect to spousal support and attorney fee issues; it did not permit consideration of accounting fees. In *Mitchell v Cole (After Remand)*, 196 Mich App 675, 679; 493 NW2d 427 (1992), this Court stated:

Defendants' first argument is that the trial court erred in ordering payment of damages in the circuit court and the Court of Claims. We decline to address this issue because the trial court acted outside the scope of the directive on remand, which was to resolve those damage issues addressed by this Court in the initial appeal and to award attorney fees. Accordingly, this issue was not properly before the trial court and the orders addressing it must be set aside. [Citations omitted.]

Here, the trial court's order directing defendant to pay \$50,000 toward accounting fees incurred by plaintiff was likewise outside the scope of this Court's directive on remand, and thus the court lacked authority to enter such an order. Accordingly, we vacate that portion of the amended judgment of divorce upon second remand relative to the accounting fees.¹

We now turn to the various issues regarding spousal support. The award of alimony or spousal support is within the discretion of the trial court, and thus it is reviewed for an abuse of discretion. See *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003); *Thames v*

¹ Although plaintiff argues that defendant failed to preserve the argument that the court lacked authority to award accounting fees, a review of plaintiff's proposed findings of fact and conclusions of law submitted after trial reveals that plaintiff did not make a separate request for accounting fees. After accounting fees were awarded, defendant raised the argument that the court lacked authority to do so in his motion for reconsideration.

Thames, 191 Mich App 299, 307; 477 NW2d 496 (1991). We review the trial court’s factual findings relating to an award of spousal support for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). “The main objective of [spousal support] is to balance the incomes and needs of the parties in a way that will not impoverish either party, and [spousal support] is to be based on what is just and reasonable under the circumstances of the case.” *Olson*, *supra* at 631, citing *Moore*, *supra* at 654.

Consistent with the language of *Czajkowski I* and *II*, the factors to be considered in making an award of spousal support were set forth in *Parrish v Parrish*, 138 Mich App 546, 553-554; 361 NW2d 366 (1984). They are: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the ability of the parties to work; (4) the source and amount of property awarded to the parties; (5) the age of the parties; (6) the ability of the parties to pay spousal support; (7) the present situation of the parties; (8) the needs of the parties; (9) the health of the parties; (10) the prior standard of living of the parties and whether either is responsible for the support of others; and (11) general principles of equity. *Id.*

We think it important to take note of the specific directive given to the parties and the trial court by the panel in *Czajkowski II*. This Court stated:

However, we conclude that the trial court erred because it did not follow the specific instructions of this Court on remand. *Czajkowski I* emphasized the disparity between the incomes of the two parties and the principle that alimony was an equitable consideration based not only on the needs of the recipient party, but on the payor’s potential income and ability to pay. Noting that marriage is a joint venture, the Court stated that where both partners have contributed to the whole, both should enjoy the benefits. *Czajkowski I* also focused on the following facts: (1) during the fourteen years of marriage, the couple’s joint income increased from approximately \$100,000 to \$700,000, (2) plaintiff was at least partially responsible for the increase in their joint income, and (3) plaintiff’s ability to earn an income was limited due to health concerns. Based on the finding that the trial court’s initial assessment was inequitable given all of the circumstances of the case, *Czajkowski I* remanded with specific instructions to consider all of the *Parrish* factors.

However, in its opinion on the record, the trial court addressed only four of these factors, the defendant’s ability to pay, the prior standard of living of the parties, plaintiff’s needs, and general principles of equity. Further, the trial court did not cite any evidence supporting its findings regarding the reasonableness of plaintiff’s projected expenses and defendant’s reduced standard of living and ability to pay alimony. In the end, the trial court awarded only a negligible increase in the award of alimony, which would appear to fly in the face of the conclusion that the original award was inequitable. A trial court is precluded from taking actions inconsistent with the instructions or judgment of the remanding court. *Barcheski v Grand Rapids Public Schools*, 162 Mich App 388, 394; 412 NW2d 296 (1987). For these reasons, we conclude that the trial court clearly erred by failing to consider all of the *Parrish* factors as instructed and by

failing to alleviate the inequity found in the previous award. Therefore, we again vacate the trial court's alimony award and remand this case for reconsideration with the specific instruction to consider all of the *Parrish* factors.

Plaintiff next argues that the trial court clearly erred by reimposing the durational limits on the alimony award vacated by this Court. Because we are vacating the trial court's alimony award, this issue is moot. However, because the issue is likely to arise again after remand to the trial court, we will briefly address plaintiff's argument.

To the extent that the trial court determined that *Czajkowski I* did not vacate the durational limit on the original alimony award, it erred. *Czajkowski I* did not directly address the durational limit on the alimony award; however, the award was vacated in its entirety. On remand, the trial court would have been within its discretion to conclude that the new alimony award should be limited to eight years, assuming that it properly considered all of the *Parrish* factors and found that a limited award was equitable under the circumstances. We find no error per se in the trial court's determination that the award should be limited to eight years, but again vacate the award in its entirety. On remand, the court shall consider anew, in light of all the *Parrish* factors, both the amount of the award and whether a durational limit is appropriate. [*Czajkowski II*, *supra*, slip op at 2-3.]

Here, the trial court did exactly as it was instructed by the *Czajkowski II* panel and did so in a thorough, thoughtfully-contemplated opinion. We have scrutinized the trial court's opinion and find that the court took into consideration all of the *Parrish* factors in great detail, cited evidence in the record in support of its various findings, and issued an award that was equitable under all of the circumstances. Minimally, we cannot conclude that the trial court's factual findings constituted clear error, nor that the court abused its discretion in setting the amount *and the applicable timeframe* relative to the award. We adopt or incorporate by reference the trial court's opinion. We additionally note that, while the main thrust of defendant's argument is that he has an insufficient cash flow to pay spousal support considering the vast amount of debt that he was saddled with as a result of the divorce judgment, there was evidence showing that he could indeed make the ordered spousal support payments. The incurred debt was associated with assets awarded to defendant in the judgment of divorce, and the trial court divided the marital estate on the basis of the estate's net value.² Post-judgment payments toward many of these debts increased defendant's equity in various assets, of which several were income-producing properties, let alone the increase in value due to general market appreciation. Income producing properties received by defendant in the divorce judgment included the Port Huron clinic

² While defendant was given the liability associated with various assets, these assets, according to defendant's own expert, were valued at approximately 6 million dollars without consideration of the debt.

building, the Fraser clinic building, and the Fraser administration building. There was testimony that defendant significantly increased his wealth or net worth since the divorce. Defendant was able to lower his debt by approximately 2.9 million dollars from the time the divorce judgment was entered.³ The record reflects that defendant has a strong earning capacity. We have difficulty accepting defendant's position of impoverishment, where, as one example, defendant built a new home before selling the marital home for which he was still paying a mortgage. There was evidence presented that defendant has been regularly grossing over a million dollars a year. To the extent that there was conflicting expert opinion from competing accountants regarding the parties' debts, budgets, incomes, and cash flows, the trial court's resolution of the conflicts was a matter of credibility judgments made by the court with which we will not interfere.⁴ See MCR 2.613(C); *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999).

With respect to plaintiff's lifestyle or standard of living before and after the divorce, the record is clear that her living standard declined significantly following the divorce. Without consideration of spousal support, plaintiff's lone source of income is \$12,000 in annual Social Security benefits, and defendant does not dispute the court's finding that plaintiff's numerous physical ailments and illnesses preclude her from earning an income in the future.

With regard to defendant's arguments concerning his shoulder problems and the possibility of retirement, there is nothing in the record showing a current impact or effect on his income and earning capacity or a definitive desire to retire at this time, but rather the arguments are speculative and relate to the future. The award of spousal support in this case is always subject to subsequent modification should new circumstances actually arise making it legally appropriate to modify the award. See MCL 552.28; *Staple v Staple*, 241 Mich App 562, 569; 616 NW2d 219 (2000). For the same reasons listed above, we also reject defendant's argument that the court erred in ordering retroactive spousal support in the amount of \$125,000 for the years 1996 through 2001. The arrearage award was based on the trial court's conclusion that defendant should retroactively pay spousal support in the amount of \$125,000 for the period of June 6, 1996, through December 31, 2001. Because this Court on two earlier occasions held that the amounts previously awarded, \$62,400 and \$84,000, were insufficient, and because these awards were vacated, the trial court necessarily had to award spousal support in a greater amount than \$84,000 commencing in 1996 when the divorce judgment was entered. In so doing, there was no prospect of avoiding the creation of an instant arrearage. To rule that defendant should not be saddled with an arrearage is to essentially rule contrary to *Czajkowski I* and *II*, which would violate the law of the case doctrine. See *Ashker v Ford Motor Co*, 245 Mich App 9, 13;

³ In defendant's appellate brief, it states, "The current amount of this debt is approximately \$2.6 million, which means that Dr. Czajkowski has managed to pay off approximately \$2.9 million of debt."

⁴ We also reject defendant's arguments predicated on the Washtenaw County Guidelines. There is no legal authority requiring consideration of the guidelines, and they lack the force of law. *Czajkowski I* stated nothing to the contrary.

627 NW2d 1 (2001) (ruling by an appellate court on an issue binds the appellate court in the future and all lower tribunals with respect to that issue).

As to plaintiff's argument on cross-appeal that the trial court erred in allowing defendant to pay the support arrearage at the rate of \$40,000 annually, we conclude that the court did not abuse its discretion in so ordering. In light of the spousal support award and the award of attorney fees that must be paid by defendant, along with consideration of the evidence regarding the parties' finances, we deem as fair and reasonable the \$40,000 annual minimum to be paid toward the support balance or debt.

We next address the various issues raised on appeal relative to the award of attorney fees. This Court reviews a decision to award or deny attorney fees in domestic relations actions for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Underlying findings of fact upon which the court bases its award of attorney fees is reviewed for clear error. *Id.* Related questions of law are reviewed de novo. *Id.*

"In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C)." *Id.* Attorney fees are not recoverable as a matter of right in divorce actions, but either under the statute or the court rule, they may be awarded where a party needs financial assistance to prosecute or defend the action. *Id.* "A party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993), citing *Kurz v Kurz*, 178 Mich App 284, 289; 443 NW2d 782 (1989). Attorney fees may also be recovered where a party engages in unreasonable conduct during the course of litigation, thereby forcing the party innocent of wrongdoing to incur fees and expenses. *Reed, supra* at 164-165. The party seeking an award of attorney fees bears the burden of proving that they were incurred and that they are reasonable. *Id.* at 165-166. Where attorney fees are contested, it is incumbent on the court to conduct a hearing to examine and determine whether and what services were actually rendered and to determine the reasonableness of the services. *Id.* at 166. Attorney fees may not be awarded solely on the basis of what a court perceives to be fair and equitable principles. *Id.*

Citing *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), this Court in *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 114; 593 NW2d 595 (1999), stated that the court should consider the following factors in determining whether attorney fees are reasonable: (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expense incurred; and (6) the nature and length of the professional relationship with the client.

Regarding attorney fees, the *Czajkowski II* panel directed:

Plaintiff next contends that the trial court abused its discretion by awarding attorney fees that were grossly inadequate, forcing plaintiff to use marital assets to pay her fees, contrary to the previous ruling of this Court. A trial court's award of attorney fees will be upheld absent an abuse of discretion. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 644 (1993).

Czajkowski I made clear that the trial court should consider whether an award of attorney fees is necessary to allow plaintiff to carry on the action. The Court also noted that the original award of \$10,000 would appear to require that plaintiff invade her property award to pay her attorney fees, which apparently exceeded \$100,000, and that, in this case, attorney fees should be properly considered as one of plaintiff's expenses.

There is no indication in the record that the trial court ever received evidence that would support the reasonableness of plaintiff's attorney fees. If plaintiff's fees actually exceed \$200,000, then the current attorney fee award of only \$35,000 would still require plaintiff to invade her assets and the alimony intended for her support. The court may not require a party to invade her assets to satisfy attorney fees when she is relying on those assets for her support. *Maake, supra* at 189; *Kurz v Kurz*, 178 Mich App 284, 289; 443 NW2d 782 (1989). Therefore, it would appear that the trial court abused its discretion in awarding plaintiff only a small portion of her claimed fees.

Because the court has already determined that an award of attorney fees is appropriate in this case, it should either award a reasonable amount of fees based on the evidence plaintiff presented, or, if defendant contests the reasonableness of the fees, hold an evidentiary hearing on the matter. See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). The trial court should also fully explain the reasons for its decision. *Id.* Therefore, on remand, the trial court should reconsider its award of attorney fees and either provide a full explanation on the record for its determination or, in the alternative, conduct an evidentiary hearing. [*Czajkowski II, supra*, slip op at 3-4.]

Here, we find the trial court's opinion regarding the award of attorney fees to be thoughtful and well-analyzed, and we decline to reverse the trial court's ruling. Once again, the court did exactly as it was instructed by the *Czajkowski II* panel. The trial court properly considered and analyzed all of the various factors cited above in *Head, supra*. We adopt or incorporate by reference the trial court's findings on these factors. There was clear evidence that plaintiff was in great need of financial assistance to pay the attorney fees associated with the litigation, and there was evidence that defendant has the capability of covering the costs. Indeed, there was evidence that plaintiff invaded, i.e., sold, assets awarded to her in the divorce to make payments on the large and outstanding bill for attorney services. There was no clear error with respect to the court's findings of fact, nor did the court abuse its discretion in awarding attorney fees in the amount ordered.

Finally, in regard to plaintiff's argument on cross-appeal that the trial court erred in failing to award her the full amount of the fees incurred less amounts forgiven or already paid for by defendant, we decline to reverse the court's award, where it was reasonable and supported by

the record, and where there existed a sound legal basis, as indicated by expert testimony, to refuse plaintiff's request for payment of the full amount demanded.⁵

Affirmed in part, and vacated in part and remanded for entry of an amended judgment of divorce consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Patrick M. Meter

⁵ We decline plaintiff's request for attorney fees associated with this appeal. While, as we have indicated, plaintiff's financial position is precarious with regard to litigation-related fees and costs, in light of the amounts awarded to plaintiff by the trial court and affirmed in this opinion, an additional award of appellate attorney fees is unnecessary.